Filed 4/30/19 P. v. Mahmood CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. AHSAN MAHMOOD, Defendant and Appellant.	D073800 (Super. Ct. No. SCD272843)

APPEAL from a judgment of the Superior Court of San Diego County, Hon. Melinda J. Lasater, Judge. Affirmed.

Britton Donaldson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A, Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Ahsan Mahmood challenges the validity of a term of his guilty plea that permitted a higher sentence if he were arrested or convicted of a new offense before sentencing. We affirm the judgment.

BACKGROUND

Mahmood was charged with one count of indecent exposure with a prior conviction (Pen. Code, § 314, subd. (1)),[1] with an allegation that he had one prior conviction[2] for which he had served a prison term (§ 667.5, subd. (b)). The sentence range for indecent exposure with a prior is sixteen months, two years or three years. (§ 314.) An additional year of imprisonment could be added for the prior prison conviction. (§ 667.5, subd. (b).) Mahmood entered into a negotiated disposition on December 8, 2017, in which he agreed to plead guilty to the charge and in return the People agreed to dismiss the prior prison conviction. The parties stipulated to the middle term of two years, concurrent to any time imposed on his parole revocation.

The trial court advised Mahmood of his constitutional rights and the consequences of his plea. The court told Mahmood that he could be sentenced to three years for the charge, but that Mahmood had negotiated a term of only two years in prison. Mahmoud signed a change-of-plea form. The court ensured that Mahmood had read and understood the form, initialed applicable paragraphs and signed the form. Mahmood admitted that he was guilty of indecent exposure and had a prior conviction for indecent exposure. He

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1 Further statutory references are to the Penal Code unless otherwise specified.

2 The prior conviction was for three counts of indecent exposure.

admitted on his plea form that he had "willfully, lewdly and unlawfully exposed my person and private parts thereof in a public place where other persons were present to be offended or annoyed thereby." The trial court also considered the 911 call and Mahmood's statements to the police and found there was a factual basis for the plea. It also found Mahmood understood the nature of the charges and the consequences of the plea and knowingly and voluntarily waived his constitutional rights and pleaded guilty.

Mahmood signed a *Cruz*[3] waiver as part of his agreement, agreeing to waive his negotiated right to the stipulated sentence of two years if he were arrested for or committed a new offense, or if other contingencies occurred, before sentencing. Mahmood placed his initials next to the "*Cruz* waiver" term on his change of plea form. By initialing the term, Mahmood stated, "I understand that if pending sentence I am arrested for or commit another crime, . . . the sentence portion of this agreement will be cancelled. I will be sentenced unconditionally, and I will not be allowed to withdraw my guilty/no contest plea(s)." Mahmood signed the change of plea form under penalty of perjury, affirming that he had read, understood and initialed each term and everything stated was true and correct. His attorney signed a statement that he had personally read and explained to Mahmood the entire contents of the plea form and had discussed with him all consequences of the plea. He personally watched Mahmood read and initial each term, acknowledging his understanding and waivers. Defense counsel concurred in Mahmood's plea and waiver of constitutional rights.

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3 *People v. Cruz* (1988) 44 Cal.3d 1247 (*Cruz*).

Before sentencing, Mahmood was charged with committing another offense, oral copulation while confined in a custodial facility (§ 288a, subd. (e)), on January 1, 2018. After a preliminary hearing on that charge on February 8, Mahmood was held to answer and an information charging this new crime was filed on February 16, 2018.

Mahmood was sentenced on the present case on March 28, 2018. Mahmood knew that he could be sentenced to more than the stipulated sentence because of his new arrest. He did not object to an increased sentence or to the court's ability to impose an increased sentence. He raised an unrelated objection, that the second case was invalid because the crime of oral copulation while in custody violated the equal protection rights of people attracted to the same sex. The trial court entertained Mahmood's arguments. It found no constitutional infirmity with the crime of oral copulation while in custody. It therefore proceeded to sentence Mahmood in accordance with the *Cruz* waiver in the plea agreement, that is, unfettered by the sentence negotiated in that agreement.

The trial court imposed the aggravated sentence of three years. It found in aggravation that Mahmood had taken advantage of vulnerable people, he had numerous prior convictions, he had served a prior prison term and was on parole when he committed the indecent exposure. There were no mitigating factors. The prosecutor dismissed the new case because the court had considered the facts underlying that case in imposing the aggravated term.

Mahmood filed a timely notice of appeal and obtained a certificate of probable cause to appeal.

DISCUSSION

Mahmood contends that his *Cruz* waiver was invalid because he was not fully advised of his rights under section 1192.5. He forfeited this claim by failing to object to the aggravated sentence on this ground and this claim lacks merit.

A. *Legal Principles*

1. *Forfeiture*

A defendant forfeits a claim of error if he failed to object to a trial court's discretionary sentencing choice. (*People v. Scott* (1994) 9 Cal.4th 331, 353 (*Scott*); *People v. Sperling* (2017) 12 Cal.App.5th 1094.) Mahmood forfeited his claim on appeal because he did not object to the trial court's decision to impose a prison term higher than the term agreed to in the plea negotiation.

2. *Plea Agreement*

If a plea agreement specifies the sentence to be imposed, the defendant cannot be punished more severely than agreed under section 1192.5. The trial court must inform the defendant that its approval of the agreement is not binding and that the court may withdraw its approval for the plea in light of further considerations. If that happens, the defendant has the right to withdraw his approval of the plea as well. (§ 1192.5[4]; *Cruz*,

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4 Section 1192.5 provides in relevant part:

"Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea.

supra, 44 Cal.3d at p. 1250.) The *Cruz* court foresaw that the parties might choose to waive this statute to permit a sentence in excess of the bargained-for term if the defendant willfully failed to appear for sentencing or under other conditions. Such a waiver is permitted as long as the defendant knowingly and voluntarily agrees to that waiver. (*Cruz*, at p. 1254, fn. 5; *People v. Vargas* (2007) 148 Cal.App.4th 644, 649–650 (*Vargas*); *People v. Mosby* (2004) 33 Cal.4th 353, 365 (*Mosby*) [waiver of state statutory right to jury trial on prior conviction must be knowing and voluntary].) The waiver of statutory rights must be " ' "a voluntary and intelligent choice among the alternative courses of action open to the defendant." ' " (*Mosby*, at p. 361, quoting *People v. Howard* (1992) 1 Cal.4th 1132, 1177-1178 (*Howard*).)

The knowing nature of the waiver must be determined from the totality of the circumstances. (*People v. Davis* (2009) 46 Cal.4th 539, 586; *Mosby, supra*, 33 Cal.4th at p. 361; *Howard, supra*, 1 Cal.4th at pp. 1177–1178.) Explicit advisal of the right being waived is not necessary for a knowing and voluntary plea. (*Howard*, at pp. 1177–1178 [plea valid even though no explicit advisal of constitutional right].) For the *Cruz* waiver to be valid, it was not necessary for the court to expressly advise a defendant that he has a right to withdraw his plea if, at sentencing, the trial court withdraws its approval and proposes a higher sentence. (*Mosby*, at p. 361; *Howard*, at pp. 1177–1178.) There is no requirement for a talismanic recitation of the right being waived. (*Howard*, at p. 1180.)

"If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so. . . ."

The court may rely on a validly executed waiver form as a sufficient advisal of rights. (*People v. Cisneros-Ramirez* (2018) 29 Cal.App.5th 393, 402–403; *Mosby*, *supra*, 33 Cal.4th at pp. 360–361.) The court need not specifically review the waiver with the defendant when both the "defendant and his attorney have signed a waiver form, both have attested to defendant's knowing and voluntary relinquishment of his rights, and the trial court's examination of defendant and his attorney raised no questions regarding defendant's comprehension of his rights or the consequences of his plea." (*Cisneros-Ramirez*, at p. 402; *People v. Panizzon* (1996) 13 Cal.4th 68, 83–84.)

We independently examine the entire record to determine whether the defendant knowingly and voluntarily waived his rights. (*People v. Elliott* (2012) 53 Cal.4th 535, 592.)

B. *Analysis*

Mahmood's *Cruz* waiver was intelligent and voluntary. The language of the agreement was clear. Mahmood agreed, under penalty of perjury, "that if pending sentence I am arrested for or commit another crime, . . . the sentence portion of this agreement will be cancelled. . . . and I will not be allowed to withdraw my guilty/no contest plea." The record as a whole shows that Mahmood chose a voluntary and intelligent course among the alternative courses of action open to him when he negotiated a plea that included a stipulated two-year sentence, dismissal of his prior prison conviction, and the possibility of a higher sentence if he were arrested for or convicted of another offense before sentencing. The trial court carefully advised Mahmood of the rights he was giving up and the consequences of his plea. Mahmood had questions about

issues that concerned him, such as the right to cross-examine witnesses. He objected to being sentenced by a different judge, so the provision allowing sentencing by a different judge was stricken from the terms of the agreement. He did not question the possibility of a higher sentence if he committed further crimes or object to that term. He was advised by counsel, who concurred with the terms of the negotiation.

The subsequent conduct of Mahmood and his counsel showed their understanding and acceptance of the *Cruz* waiver. When they returned for sentencing, Mahmood acknowledged through his attorney that he was subject to a higher sentence because he had been arrested for another crime, and he did not object to the likelihood of a higher sentence. This failure to object forfeits his claim on appeal (*Scott*, *supra*, 9 Cal.4th at p. 353) and also shows that Mahmood understood and accepted that he would receive a more severe sentence if he were arrested for another crime.

Mahmood contends that the *Cruz* waiver was not knowing and intelligent because he was not explicitly advised of the provisions of section 1192.5. But explicit advisal of rights is not necessary for a knowing waiver even when the rights waived are constitutional. (*Howard*, *supra*, 1 Cal.4th at pp. 1177–1178; *Mosby*, *supra*, 33 Cal.4th at p. 361.) Mahmood relies on cases in which the *Cruz* waiver explicitly stated that a defendant ordinarily has the right to withdraw a plea if he is to be sentenced more harshly than agreed upon. (See *People v. Rabanales* (2008) 168 Cal.App.4th 494 (*Rabanales*); *Vargas*, *supra*, 148 Cal.App.4th 644.) The plea forms in those cases included the statement that the defendant was giving up his right to withdraw his plea and his right not to receive a sentence higher than that specified in the agreement. (*Rabanales*, at pp. 504–

505; *Vargas*, at p. 648.) The language of the *Cruz* waiver was not at issue in those cases, and neither suggested that such language was necessary. Those cases do not require an explicit recitation of the statutory rights under section 1192.5.

After reviewing the record independently, we are satisfied that under the totality of the circumstances, Mahmood knowingly and voluntarily agreed that he could receive a higher sentence and would not be permitted to withdraw his plea if he were arrested for or convicted of another crime before he was sentenced in this case.

2. *The Agreement Did Not Require a Finding Beyond a Reasonable Doubt*

Mahmood also contends that any violation of the *Cruz* term had to be proved beyond a reasonable doubt. We disagree.

Mahmood agreed that he could receive a more severe sentence if he were "arrested for or commit[ted] another crime." This language sets the standard of proof as much lower than beyond a reasonable doubt, as Mahmood did not even have to be convicted of a crime in order to lose the benefit of the negotiated plea. An arrest, alone, was sufficient to cancel the sentence agreement. Here, as in *Rabanales*, "the plea agreement contains no express term guaranteeing defendant a right to be tried and convicted by a jury of a new criminal offense in a separate case before the trial court in this case could find him in violation of his [*Cruz*] waiver." (See *Rabanales*, *supra*, 168 Cal.App.4th at pp. 505-506.) Mahmood never requested a finding beyond a reasonable doubt.

In *Rabanales*, even though the defendant put an "X" in the box next to the paragraph stating that any violation of the *Cruz* waiver would be decided by a preponderance of the evidence, seeming to negate that term, the appellate court

concluded that the "X" was inadvertent because deviation from the standard terms was not discussed on the record and it was not a material condition for the agreement. (*Rabanales*, *supra*, 168 Cal.App.4th at pp. 505–508.) The appellate court said that the defendant would have made a clear record if he intended to preserve his right to a jury trial on the violations. Further, and "[m]ost tellingly," the defendant did not request a jury finding on the violation beyond a reasonable doubt in subsequent hearings on the violation. (*Id*. at pp. 507–508.) Mahmood never requested a finding beyond a reasonable doubt either at the time of entering into the agreement or at sentencing. That was not a term of his agreement. Here, the defense counsel agreed with the trial court's assertion that neither a conviction nor finding beyond a reasonable doubt was a prerequisite to finding a *Cruz* violation.

We conclude that the trial court did not err in sentencing Mahmood to the upper term for indecent exposure with a prior conviction, in accordance with Mahmood's valid *Cruz* waiver.

DISPOSITION

The judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

DATO, J.